(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 16 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess either a Master's degree or equivalent and three years of work experience or a Bachelor's degree or equivalent and five years of progressive experience and did not meet the second preference visa classification as an advanced degree professional.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petition merits approval.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

When determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services, (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this case, the priority date of the petition is December 3, 2004, the date by which the petitioner must establish the beneficiary's educational, training and experiential credentials. It must also demonstrate its own continuing ability to pay the proffered wage from this date onward. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Block 14 of the Form ETA 750 requires that for the position of software engineer, the beneficiary must have five years of college culminating in a Master's degree or foreign equivalent in Engineering, Information Systems Technology or Computer Science plus three years of work experience in the job offered. Block 15 states that in lieu of this requirement, the petitioner will accept a "Bachelor's degree or equivalent in Engineering, Information Systems, Technology or Computer Science and 5 years of progressive work experience in job duties listed above." (sic)

On Part B of the Form ETA 750, the beneficiary claims that he has a three-year Bachelor of Computer Science degree from India, and received his diploma in June 1998. The petitioner submitted a copy of the beneficiary's Higher Diploma in Software Engineering from awarded on March 29, 1997, for coursework completed in 1996. This credential was omitted from the labor certification. The petitioner also submitted a copy of the diploma and transcript of marks representing the beneficiary's three-year Bachelor of Science in Computer Science awarded in June 1998 from

Eligibility for the Classification Sought

As noted above, the Form ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the

alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and education equating to an

[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa

advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

The petitioner also submitted four evaluations of the beneficiary's educational credentials. The first is from signed by Although stated to be accompanied by statement of qualifications and resume, no such documentation was provided. determines that the beneficiary's *combined* education from which was received in March 1997, prior to his foreign degree completed in 1998, and his three-year degree together are equivalent to a U.S. Bachelor of Science degree in Computer Science. erroneously concludes that the diploma followed the beneficiary's bachelor studies at On appeal, counsel asserts that this verbiage should be construed as meaning that after the beneficiary enrolled at the beneficiary *thereafter* enrolled in the part-time program at The beneficiary's transcript of marks do not support this interpretation of the evaluation as they show that the beneficiary's first enrollment at was in 1994 and his first enrollment at was in 1996.

An evaluation from Professor New York, has been submitted on appeal. Professor determines that taking into consideration the concurrent two-year part-time course of study at combined with the beneficiary's three-year degree in Computer Science from the beneficiary has the U.S. equivalent of a Bachelor of Science in Computer Science. He describes as being "[e]stablished in 1988, was the first institution to receive an ISO 9001 certification for Education Support Services." This evaluation does not provide any definition of an "ISO 9001" certification and does not provide any evidence that this appellation means that this institution is a college or university or is authorized to confer baccalaureate credit.

Evaluations are also submitted from and Professor is also affiliated with the Both evaluations conclude that standing alone, the beneficiary's three-year Bachelor of Science degree from is the U.S. equivalent of a four-year Bachelor of Science in Computer Science. Neither evaluation addresses the beneficiary's education at Counsel indicates on appeal that these evaluations should not be considered. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the

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classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). Before consideration of the components of a single degree, the record must show that all baccalaureate study is from an accredited college or university. This record contains no evidence that is a college or university, or an accredited institution authorized to confer baccalaureate credit.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

As noted in the AAO's RFE, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[3] If placement recommendations are included, the Council Liaison works with the author to give

[3] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[4] As the AAO noted in its RFE, EDGE provides that:

> The Postgraduate Diploma, following a two-year bachelor's degree, represents attainment of a level of education comparable to one year of university study in the United States. Credit may be awarded on a course-by-course basis.
>
> The Postgraduate Diploma, following a three-year bachelor's degree, represents attainment of a level of education comparable to a bachelor's degree in the United States.
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> Postgraduate Diplomas should be issued by an accredited university or an institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note that entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree. Rarely you may find a full time 2 year post graduate diploma.

Based on this juried opinion, the AAO must conclude that the beneficiary's baccalaureate in this matter is only equivalent to three years of undergraduate education from a regionally accredited institution in the United States. Moreover, as noted above, the course of study was pursued prior to and concurrently with his studies at the university. It is noted that the regulatory language of 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." While this relates to a lesser classification, professionals under section (b)(3) of the Act, it cannot be concluded that the beneficiary is a member of the professions holding an advanced degree if he cannot be considered a member of the professions in the first place. Thus, even if the diploma from is considered as a post-graduate diploma (which it is not), in order for the beneficiary to be eligible for the classification sought, must be an

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[4] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

accredited college or university. No independent, probative evidence has been submitted to the record showing that the beneficiary's diploma from is from a college or university or is from an AICTE approved institution. The petitioner has not provided objective evidence to overcome the inconsistencies between the evaluations provided and the EDGE materials cited. While the AAO would have considered peer-reviewed published materials supporting the evaluations provided, such evidence has not been provided.

On appeal, counsel relies on *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) and on a letter, dated January 7, 2003, from Director of the Business and Trade Services Branch of U.S. Citizenship and Immigration Services' (USCIS) Office of Adjudications to private counsel. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000) (incorporated into the record of proceeding). Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

The AAO additionally finds the *Butte County* decision inapposite in this proceeding because neither the proceeding nor the facts in that case are comparable. In this case, the issue is whether an aggregate mixture of courses from the beneficiary's university and which is neither a college or university and has not been shown to be accredited by the AICTE or otherwise authorized to issue baccalaureate level credit, can be considered to satisfy the terms of the labor certification and the requirements of an advanced degree professional. In *Butte County*, a county sued the National Indian Gaming Commission (NIGC) and Department of Interior in which the NIGC approved a gaming ordinance enacted by the Mechoopda Tribe and the department took a parcel of land in the county into trust on behalf of the tribe. The issue was whether the land that the Tribe had purchased and offered to the Department of the Interior to take into trust for its benefit qualified as "restored lands." The Dept. of Interior did not make a final decision of whether the land constituted restored lands until two years after it had informed the County that it would not revisit the issue because the Office of the Solicitor had reviewed the matter in 2003 and the Department concurred with the NIGC's determination in March 2003. The court remanded the case because the Dept.'s decision was premature and the County's evidence was never considered by the Secretary.

Counsel also suggests for the first time on appeal, that the petition should be approved as a third preference EB3 classification as a skilled worker and encloses a replacement Form I-140 on appeal with paragraph e designated, which selects a professional or skilled worker visa classification. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Because the beneficiary has neither: (1) a U.S. master's degree or foreign equivalent degree in Engineering, Information Systems Technology, or Computer Science, nor; (2) a U.S. baccalaureate degree or foreign equivalent degree in Engineering, Information Systems Technology, or Computer Science plus five years of progressive experience in the specialty, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.[5]

Beyond the decision of the director, it is noted that the AAO's RFE requested that the petitioner provide a certificate of good standing that it has lawful authority to transact business in the state of Iowa. As noted in the AAO's RFE, the address where the alien will work is stated on Item 7 of the Form ETA 750 as "1922 Ingersoll Avenue, Suite 1100, Des Moines, IA 50309." *No other locations are stated.* A labor certification is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c). As stated in the RFE, and as reflected in the copy of the Iowa online corporate records provided to the petitioner, the state of Iowa revoked the petitioner's certificate of authority on August 11, 2008.[6]

Although the petitioner provided some evidence that the petitioner has maintained a small presence in the form of an office in Iowa and has filed some required tax returns, asserting that it is "active," the petitioner failed to provide a certificate of good standing as requested from the Secretary of State of Iowa or that it has a certificate of authority from the state and is authorized to transact business in the state. *See* Iowa Code § 490.1530. The AAO cannot conclude that this job offer as specified on the Form ETA 750 to be located in Des Moines, Iowa remains a valid one where the foreign corporate employer is not authorized to lawfully transact business in the state designated as the location of the offered position.

Additionally, following a review of the beneficiary's Wage and Tax Statements (W-2), his Form G-325A, Biographic Information, and individual federal tax returns submitted in connection with his

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[5] Since the AAO has determined that the beneficiary does not have a U.S. bachelor's degree or a foreign degree equivalent and does not qualify for the advanced degree professional visa classification, the issue of whether the petitioner resolved the inconsistencies in the beneficiary's claimed five years of progressive work experience is moot.

[6] Its status currently remains the same. *See* Iowa corporation records online at http://sos.iowa/gov/search/business/(S(pwgzo3az01mlaw55zzu5s255))/summary.aspx/c=ct. (Accessed on March 31, 2013)

Form I-485, Application to Register Permanent Residence or Adjust Status, it appears that the beneficiary has never been employed by the petitioner or lived in Iowa, despite claiming continuous employment for the petitioner since November 2003. The one submitted copy of a contract for software consultancy services that gives the petitioner's Des Moines, Iowa address in 2004, and which does not reference the beneficiary, calls for the services to be performed in Chicago, Illinois. Counsel asserts in this respect that the employment in Iowa remains possible given that the petitioner may lease space at a location within normal commuting distance within the metropolitan statistical area. Speculative, undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It remains that the location designated on the Form ETA 750 is at a Des Moines, Iowa location, the lapse of the petitioner's corporate certificate of authority, the lack of employment of the beneficiary at this location and the evidence that the petitioner employs the majority of its workers at other locations fails to support the mutual intent of the petitioner and the beneficiary that a job offer in this location formed the basis of *a bona fide* offer of employment.

Relevant to the petitioner's ability to pay the proffered wage of $85,000 per year, on the petition, the petitioner claimed to have been established in 1997 and to currently employ 23 workers. On the Form ETA 750B, which was signed by the beneficiary on August 27, 2004, it is claimed that he has worked for the petitioner since December 2003. The beneficiary's G-325, Biographic Information, submitted in connection with a Form I-1485, states that the beneficiary has been employed by the petitioner since November 2003.[7]

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner's net income or net current assets can cover the difference between any wages paid to the beneficiary in a given year and the proffered

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[7]The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. As stated above, the petitioner must also establish that the beneficiary possessed the experience, education and training as of the priority date. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

wage, then the petitioner may be deemed to have established its ability to pay the full proffered wage in that year. In this case, the beneficiary's W-2s issued by the petitioner indicate that he was paid in amounts exceeding the proffered wage for all years except 2004, 2005, and 2006.

In 2004, the petitioner issued two W-2s to the beneficiary, although counsel uses one showing a wage payment of $12,987. In addition to this W-2, a second W-2 was submitted showing wages paid to the beneficiary by the petitioner amounting to $15,904, for a total of $28,891. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. USCIS will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence for 2004.

For 2005, the beneficiary's W-2 shows that he was paid $46,346 by the petitioner, which is $38,654 less than the proffered wage.

For 2006, the beneficiary's W-2 shows that the petitioner paid him $66,752, which is $18,248 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are generally shown on Schedule L of its corporate tax return, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In this case, the petitioner's tax returns reflected:

> The petitioner's net income for 2004 was $84,702. Its net current assets were $168,543.
> The petitioner's net income for 2005 was $14,904. Its net current assets were $166,711.
> The petitioner's net income for 2006 was $25,392. Its net current assets were $189,629.

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[8] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

It is noted that as the AAO stated in its RFE, current USCIS records indicated that the petitioner has filed approximately 661 non-immigrant and immigrant petitions, with approximately 135 immigrant petitions for alien workers (Form I-140s). Although counsel asserts that there is no obligation to show the ability to pay multiple beneficiaries, the AAO does not concur. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to each respective beneficiary for whom it files a Form I-140 from each respective priority dates until they gain permanent residence status. *See* 8 C.F.R. § 204.5(g)(2). This would cover not only pending petitions, where petitions that had been approved but permanent residence has not yet been achieved as of each respective priority date. Given the significant numbers petitioned for by this employer, without information relevant to each sponsored beneficiary, it is not possible to calculate the petitioner's total financial burden or demonstrate its continuing ability to pay the respective proffered wages. Therefore, the AAO's RFE requested:

> A current list and corresponding evidence in the form of W-2s, Form 1099s for every immigrant petition representing beneficiaries sponsored on 1-140 petitions from 2004 to the present showing: 1) beneficiary's name; 2) receipt number; 3) proffered wage; 4) date of hire; 5) date of termination; 6) nature of termination; 7) evidence of payment of wages for all periods employed. Please include the location of employment for each beneficiary.

The petitioner failed to provide such evidence and as stated above, asserted that it had no obligation to demonstrate the ability to pay the proffered wage for its multiple beneficiaries sponsored. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Although the petitioner submitted evidence that it had the ability to pay the proffered wage to the beneficiary in 2007 through 2011 through the payment of wages in excess of the proffered wage, the petitioner failed to submit evidence of its ability to pay the full proffered wage in 2004, 2005 and 2006. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)). Without an accounting of the multiple beneficiaries sponsored, the petitioner's ability to pay the proffered wage to the instant beneficiary for the relevant period cannot be calculated. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition

was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in [redacted] magazines. Her clients included [redacted] movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry.

In the instant case, as stated above, the petitioner has submitted no evidence relating to its sponsorship of multiple beneficiaries and without such documentation, the petitioner's ability to pay the proffered wage to the instant beneficiary cannot be calculated. Therefore, considering the overall circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.